No. 22486

In the

United States Court of Appeals

For the Ninth Circuit

JOHN F. BURKE,

Appellant,

vs.

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, and LOCAL No. 6 Thereof,

Appellees.

Appellees' Brief

On Appeal from the United States District Court
for the Northern District of California

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JURISDICTION

This is an appeal from a judgment for the Defendants entered on November 8, 1967 by the United States District Court for the Northern District of California in an action brought under Section 102 of Title I of Landrum-Griffin, the Labor Management Reporting & Disclosure Act of 1959, 29 U.S.C. 412. The basis of jurisdiction on appeal has not been indicated by appellant.

In the Court below, the Court found that violations of 29 U.S.C. 411 (a)(2) and (a)(5) were alleged, which if true the court would have had jurisdiction to remedy under Section 412. (Judgment, C.T. p. 466, L. 30 per p. 468, L. 16)[1]

1. Appellees will follow Appellants designation of the record as "C.T." for Clerk's Transcript and "R.T." for Reporter's Transcript.

STATEMENT OF THE CASE

Appellant JOHN J. BURKE was charged in writing with having violated certain sections of the Union Constitution when he, without authority and by positive misrepresentations, stole and temporarily refused to return all the copies of the Pacific Coast Shipyard Master Agreement (Plaintiff's Exhibit 16). He was tried upon this charge, and none other (the transcript of the International Trial Panel is Plaintiff's Exhibit 21); he was found guilty and expelled from membership.

In the District Court,[2] Appellant urged that the union proceedings were but a matter of form and that he was in fact "gotten" for other things. Specifically, he relied on evidence of friction between himself and one of the International's vice presidents, James Precht, and his opposition to certain Union positions. The Lower Court found that the Union's findings were supported by evidence and that there was no proof that the Trial Panel or Executive Council knew of these matters, or more importantly, acted upon any such knowledge with bias and improper motives. (Judgment, C.T. p. 466).

Although there is no specification of errors in Appellant's opening brief, it is clear that Appellant seeks a

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2. Appellant first brought suit for reinstatement in the California Superior Court. On a hearing for a preliminary injunction, the State court ordered him reinstated pending trial but without the ability to run for union office in an approaching election. In an attempt to get relief from this disability appellant sought injunctive relief in the Federal District Court, which denied the relief but with leave to amend to try the correctness of the expulsion under Section 101 (a)(2) and (5) of Title I. Upon being advised by proper motion that appellant was seeking the same relief in the Federal Court, the State court vacated the preliminary injunction and the case proceeded before the federal court. Footnote 2, p. 3 of Appellant's Brief suggests the State court, contrary to the federal court, originally returned appellant to membership on a permanent basis; such is not the case.

general review of these findings of the lower court. It is Appellees' position that this is thus largely a factual appeal and that the lower court after two weeks of having heard nearly every dispute large and small within the local union and between the personalities, and after having heard and observed both the charging party, Mr. Precht, and Mr. Burke, cannot be said to have made findings which are clearly erroneous. Rule 52(a) F.R.C.P.

STATEMENT OF FACTS

After Appellant was charged for having taken the agreements, the International President advised the Appellant that the International Union was taking jurisdiction under Section 3(b) of the International Constitution (Plaintiffs' Exhibit 17).

An informal hearing was held pursuant to notice and the International Constitution (Defendants' Exhibit A). Section 2(b) of Article XVII mandates a sincere effort to settle the matter but does not mandate the charging party to settle.

According to the testimony of Burke's counsel, Mr. Cummings, the meeting was held in a private room without notes or tapes; present for the International besides Precht, were International Vice President Whan and the International President, Mr. Berg, (R.T. p. 384, L. 7 per p. 386, L. 12). President Berg explained to Mr. Burke and Mr. Cummings that the informal conference was pursuant to a new article placed in the constitution at the last convention and that as a result in some, and perhaps many, of these cases, the charges had been resolved to the satisfaction of the parties involved. Cummings stated he thought it was a good idea (R.T. p. 386, L. 21 per p. 387, L. 10) Burke had clearly expressed his agreement (R.T. Suppl., p. 93, L. 19 per p. 94, L. 1; Plaintiff's Exhibit 20).

Mr. Burke took part freely and fully. On more than one occasion after Mr. Burke had expressed himself, International President Berg asked the charging party, Mr. Precht, whether he had heard anything which would lead him to consider withdrawal of the charges. The charging party was not persuaded to withdraw the charges (R.T. p. 388, L. 8 per 390, L. 20; R.T. p. 850, L. 10-17).

At the Union trial full opportunity was given for plaintiff to cross-examine and present evidence. Precht acted as the prosecutor; indeed he lost on the majority of the objections he made during the course of the trial. Besides Precht, Patton and Stender are the only International officials alleged to have had an "animus" against Burke (Answer to Defendants' Interrogatory No. 48 C.T. p. 116, p. 140). Stender resigned any role in the proceedings (Defendants' Exhibits E and F). There are no facts even alleged to show that any of these three wrongfully took any part or in any way influenced the proceedings, the findings or recommendation of the Trial Panel, or the subsequent action of the Executive Council.

The Report made by the International Trial Panel consisted in a full and accurate summarization of the evidence and positions taken by both sides. The Panel found that Burke as an appointed representative and a member of some 17 years standing should have been aware that his activity was contrary to the constitution and he should be prepared to accept the responsibility for his action. The Panel recommended a finding of guilty on all charges. It specifically considered Burke's motivation but found no mitigation therein (Plaintiff's Exhibit 23)

The Union Trial Panel's report was then referred along with copies of the trial transcript to each member of the Executive Council (except for Precht, the charging party,

and Stender who had been involved in the negotiation of the Master Shipyard contract and who had disqualified himself) for their review and vote by mail ballot. (Plaintiff's Exhibit 23). The charging party, Mr. Precht, testified without contradiction, that he had had nothing further to do with the matter after the Union trial (R.T. p. 851-852).

The evidence before the Trial Panel showed that Ernest Rae, the owner of the Dolores Press, surrendered all of the copies of the master collective bargaining agreement for the entire marine industry to Burke upon Burke's specific misrepresentation that he was authorized to pick up the agreements (Plaintiff's Exhibit 21, p. 16). There was a big rush to get the agreements out; the instructions for mailing were already given (*Id.* p. 16-17). The agreements were kept for over a day; criminal proceedings had to be initiated. (*Id.* p. 19)

Mr. Rotell of the Pacific Coast Metal Trades Council testified as to the importance and concern for the agreements from a time standpoint. (*Id.* p. 23-24). He, like Rae, made demands on Burke to return the agreements, all of which were ignored (*Id.,* p. 26-27). The agreements are those of the International Unions and Local Metal Trades Councils (*Id.,* p. 29).

Burke did not deny taking the agreements. Rather he testified that he had "no qualms" about what he had done (*Id.,* p. 73, L. 10), that it was the type of thing that sometimes has to be done in the labor movement to bring a matter to a head, without moral regard, and the chips would have to fall wherever they may (*Id.,* p. 73, 77-78), and he generally would do it again. The lower court found sufficient evidence to justify the union's findings and penalty.

OPPOSITION TO STATEMENT OF ISSUES

1. The lower court had the jurisdiction to take the action which it did.

2. Appellant was not deprived of the rights of speech and assembly within the Union guaranteed to him by 29 U.S.C. 411 (a)(1) and (2).

3. Appellant was not denied the safeguards against improper disciplinary action guaranteed to him by 29 U.S.C. 411 (a)(5).

ARGUMENT

I. The Lower Court Had the Jurisdiction to Take the Action Which It Did.

Section 412 of Title 29 gives the federal court jurisdiction to remedy violations of 29 U.S.C. 411. The lower court found no violations of Section 411 and properly granted judgment for defendants.

II. The Appellant Was Not Deprived of the Rights Guaranteed to Him by 29 U.S.C. 411 (a)(1) and (2).

Appellees recognize that the Act, and especially Section 411 (a)(1) and (2) were

> "designed to protect the rights of union members to discuss freely and criticize the management of their unions and the conduct of their officers."
>
> *Salzhandler v. Caputo,* 316 F. 2d 445, 448 (C.A. 2, 1963).

The real question is whether there is sufficient evidence to support appellant's conclusionary statements, such as, "It is clear that the International seized upon the incident [the taking of the agreements] as an opportunity to settle scores with Burke for his consistent opposition to its policies of subjugating Local 6 to its will. Such a reading of the record is the only one that will 'wash'." (Appellee's

Opening Brief, p. 14, L. 9). Appellant indeed states that the lower court was in error when it found that neither the Trial Panel nor the Executive Council were aware of or took into account "other things" besides the act of taking the agreements. Appellant's attempt, however, to challenge the court's finding is bereft of citations to specific evidence and merely conclusionary.

Appellant states that the "very record made before the Trial Panel (Exhibit 21) is replete with evidence that Burke was acting, throughout, contrary to the position of the International and it shows that it was this 'accumulation of events' that led to the charges" (Brief, p. 12, L. 25 f.). We are not told where in the 94 pages of the union trial transcript such evidence of other events is present, and indeed a reading of it will amply reveal that he was fully and fairly tried on the charge that he took the agreements, and nothing else. (cf. also report of Trial Panel, Plaintiff's Exhibit 23). Indeed Burke's counsel explicitly denied any intent to question the "integrity" of the Trial Panel (Plaintiff's Exhibit 21, p. 88, L. 24 f.). Whatever personal motivations may be assigned to the charging party, Mr. Precht, even *arguendo,* appellant points to no evidence that these motivations were made known to those who tried Burke or that they figured in the decision reached.

Appellant alleges that the International President "took jurisdiction away from the local", thus betraying a lack of objectivity. (Brief, p. 13, L. 3). There is no explanation of how this proves that appellant was in fact tried for other than taking the agreements. If appellant is seeking to raise a jurisdictional question, Section 3(a) of Article XVII of the International's Constitution (Plaintiff's Exhibit 1) deals with the Local Lodge's jurisdiction but that jurisdiction is expressely made subject to Section 3(b) by which International jurisdiction can be taken "if in the judgment of the

International President the circumstances warrant". The member is as much a member of the International as of the Local. President Berg informed Burke in writing on November 1, 1965 that the International was assuming jurisdiction under Section 3(b). The appellant's objection was preserved fully on the union trial record (Plaintiff's Exhibit 21, p. 8-12). Appellant inquired into the "warranting circumstances" through discovery. International Union's Answers to Interrogatories Nos. 11, 12, 13, and 14 filed June 8, 1966.

Finally, Appellant states that all the minutes of the Local which included motions made, and positions taken by Burke in opposition to the International were forwarded to the "International" and, "one may fairly infer", were known to the International "hierarchy". Appellant also refers to Burke's support of a former political opponent of Precht. Brief, p. 13, L. 14 f). We are not told which minutes, motions, positions or support; the record evidence is that the minutes were regularly sent to regional vice-president *Precht* (R.T. p. 868, 890, 916, 919, 920-921, 933); and even if arguendo, any such support or "positions" were known to the "hierarchy", appellant can point apparently to no evidence that the Trial Panel and Executive Council in fact *acted* on such knowledge or acted out of bias or other improper motives.

Appellant simply cannot supply the evidentiary bridge between speculation and proof. Indeed, he was charged, tried and convicted on the basis of having taken the agreements. The lower court concluded that the union's findings were sufficiently supported by the evidence (Judgment, C.T. p. 466). Burke *admits* he did what he was charged with doing. Immediately there is therefore *some* evidence, and the scope of review is satisfied. *Vars v. Boilermakers,* 215 F. Supp. 943, 47 L.C. Para. 18242 (D.C. Conn., 1963), aff'd 320 F. 2d 576, 47 L.C. Para. 18,334 (C.A. 2, 1963); *Parks v. I.B.E.W.,*

203 F. Supp. 288, 44 L.C. Para. 17,546 (D.C. Md., 1962), rev'd 314 F. 2d 886, 46 L.C. Para. 18,073 (C.A. 4, 1963), cert. den. 372 U.S. 976 (1963); *Rosen v. the District Council No. 9,* 198 F. Supp. 46, 43 L.C. Para. 17,074 (S.D.N.Y., 1961); *Phillips v. Teamsters Etc. Local 560,* 209 F. Supp. 768, 46 L.C. Para. 18,016 (D.C.N.J., 1962). State law, the precursor of the L.M.R.D.A., is in accord: *Madden v. Atkins,* 4 N.Y. 2d 283, 151 N.E. 2d 73, 34 L.C. Para. 71,491 (1958); *Fittipaldi v. Legassie,* 7 App. Div. 2d 521, 37 L.C. Para. 65,552 (N.Y., 1959); *Bush v. the International Alliance,* 55 Cal. App. 2d 357 (1942).

The trial below bore out that the charge (Plaintiff's Exhibit 16) and findings (Plaintiff's Exhibit 23) were supported by evidence. Burke was a member who by his own testimony was looked to for leadership (R.T. p. 278 f.). He dishonestly, unlawfully and dishonorably misused his responsible position to misappropriate union agreements which were signed and paid for by the International, the International which was the biggest and most directly involved Union in the Pacific Coast Metal Trades Council (R.T. p. 949). He did not give the International an opportunity to respond to the legal analysis of attorney Gladstein (Plaintiff's Exhibit 15) which had only been mailed on October 7, 1965. He actually planned and consulted with another before taking the agreements (R.T. Suppl., p. 63, L. 17-19; p. 69, L. 8 per p. 70, L. 7). He just left them in a car overnight (R.T. p. 473, L. 18); and he steadfastly kept them even when faced with a threat of criminal action (Plaintiff's Exhibit 21, p. 18, L. 19). When they were finally returned which was only after criminal proceedings were initiated, the printer had to spend two days reproofing, and they were delayed at least that long in being mailed (R.T. p. 335, L. 18 per p. 336, L. 7; p. 324, L. 10). Burke told the Trial Panel he had "no qualms" about what he had done

(Plaintiff's Exhibit 21, p. 73, L. 10). It cannot be seriously contended that this was conduct consistent with the duties, obligations and fealty of a member or a responsible act toward the institution any more than it was an exercise of "free speech" under Section 411 (a)(1) or (2).

III. The Appellant Was Not Denied the Rights Guaranteed to Him by 29 U.S.C. 411 (a)(5).

Section 411 (a)(5) mandates (A) written specific charges, (B) a reasonable time to prepare a defense, and (C) a full and fair hearing. On appeal we understand appellant to be limiting himself to (C) alone.

While a full and fair hearing has to do with those rudimentary rights of fair play inherent in any hearing or, as Appellant puts it, a hearing which comports with minimal standards of due process and a hearing by an unbiased and disinterested tribunal, the lower court did not find a denial of such rights.

The appellant relies again on its allegation that the whole trial was but a "pretext" for a trial on an accumulation of other events (Brief, p. 16). Appellees would make the same response as heretofore made in this Brief: there is *no* evidence to support Appellant's conclusions.

The Appellant also relies on the cover letter of January 4, 1966 by which President Berg referred the panel report (Plaintiff's Exhibit 23) and individual copies of the union trial transcript (Plaintiff's Exhibit 21) to each member of the International Executive Council (except Precht & Stender) for review and voting by mail ballot. This letter is Defendants' Exhibit H. Appellant contended below, and contends here, that the letter was in effect an "order" for a directed verdict. Appellees submit, as they did below, that all the trial court had to do was *read* the full letter.

The court did so (Judgment, C.T. p. 475 f.), and its reading of the plain language of the letter is not clearly erroneous.

In the letter, President Berg stated he was in full accord with the Panel's findings. The International President is a member of the Executive Council and thereby entitled to indicate his point of view as fully as any other Council member (Plaintiff's Exhibit 1, Article V, Section 1 f.). He asked the members to review the record "very carefully". He explained what a "yes" vote would mean and cautioned that this would be expulsion. He explained what a "no" vote would mean, and told the members that any other vote besides "yes" or "no" would have to be fully explained.

The tenor of Appellant's argument suggests that there is something inherently unlawful or suspicious about a union trial. It is a mere suggestion without foundation in the record. The mere fact that Appellant's accuser was an influential union official does not support a holding that Plaintiff was denied a fair hearing. *Cornelio v. Metropolitan District Council Etc.,* 243 F. Supp. 126 (E.D. Pa., 1965), aff'd 358 F.2d 728 (C.A. 3, 1966). There is nothing in the legislative history of the Act to justify such a suggestion. Indeed Section 101(7) of S. 1137 by Senator McClellan, as referred, had originally called for not only a full and fair hearing but also a "final review on a written transcript of the hearing, by an impartial person or persons. . . ." 105 Daily Cong. Rec. 2237, February 19, 1959, I *Legis. History of the L.M.R.D.A. of 1959,* at p. 270. The Senator offered the same language as an amendment to S. 1555, as part of the Bill of Rights amendment, Title I. 105 Daily Cong. Rec. 5810, II *Legis. History, supra,* at p. 1102. Congress did not in fact adopt the idea of review boards retaining original responsibility in the hands of the labor organization.

The Court below found that one of the union's findings, viz. that the charged act violated Section 1(e) of Article XVII of the International's Constitution was not supported by any evidence (Judgment, C.T. p. 471-472). Appellant now wants the case sent back for at least reassessment of the penalty in light of that finding.

While Appellees do not agree with the lower court's determination respecting Section 1(e), Appellees do agree that it makes no difference. Appellant was charged with taking the agreements in violation of certain enumerated Sections of the Constitution (Plaintiff's Exhibit 16). The fact that the charge is not found to be a violation of one of the enumerated subsections does not affect the intrinsic validity of the charge itself. Indeed the lower court specifically found that the violations of the other provisions of the Constitution fully justified the penalty imposed. (Judgment, C.T. p. 472). Moreover, if there is evidence to support the findings of the union, the court has no jurisdiction under the Act simply to "reweigh" the penalty. While Appellant has not given us any citations, Appellant's contention confuses another fact situation where one or two of *many* different acts charged are found to be without support in the evidence or contrary to law; that is not this case. Compare *Graham v. Soloner,* 220 F. Supp. 711 (D.C. Pa., 1963).

CONCLUSION

The findings of the lower court are not clearly erroneous and the judgment below should be affirmed.

Dated: November 14, 1968

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